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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/767,545	01/29/2004	Steven M. Goetz	1023-261US01	5360

28863	7590	01/28/2008
SHUMAKER & SIEFFERT, P. A.		
1625 RADIO DRIVE		
SUITE 300		
WOODBURY, MN 55125		

EXAMINER
BOCKELMAN, MARK

ART UNIT	PAPER NUMBER
3766	

NOTIFICATION DATE	DELIVERY MODE
01/28/2008	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docketing@ssiplaw.com

## Office Action Summary

**Application No.**

10/767,545

**Applicant(s)**

GOETZ, STEVEN M.

**Examiner**

Mark W. Bockelman

**Art Unit**

3766

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 30 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 19-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 19-54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 10-30-2007 has been entered.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 19-23, 32-41, 50-54 rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Snell USPN 5,716,382.

As an example, referring to figure 4, the algorithm selects at (2) a first parameter configuration in the form of a pacemaker stimulation. The user is prompted for an input regarding the efficacy of the pacing in terms of it's frequency of usefulness (2) and upon whether the pacing indicates neuroregulatory abnormality or not. The result of its efficacy the location of the first parmeter configuration (at the top of the tree) selects a second parameter configuration, either VVI or DDI (1) pacing. Similarly at blocks 5 and 6, the efficacy of the pacing, which can be observed along with the responsiveness of the ventricular rate to physiological stimuli. The examiner does not give weight to whether the efficacy is "observed" during pacing or not since applicant's device merely receives an input. However, to have employed the method during pacing in various configurations would have been obvious. In addition, the examiner considers the algorithm to be a computer readable medium. The pacing suggestions would entail polarity outputs to the electrode leads. VVI and DD1 involve different target regions of the heart. The examiner considers subsequent use of the programmer to update the decision tree that was followed during it's first use.

Claims 19-54 rejected under 35 U.S.C. 103(a) as being unpatentable over Kroll et al USPN 7,123,961 in view of Snell USPN 5,716,382.

Kroll et al teach the optimization of nerve stimulation by a device that determines (23: 15-17) an observed efficiency (optimal efficiency) (23:17-30) as well as

several decision trees including one that selects leads and electrodes (23:1-15) through a decision process (tree) as well as a decision tree determining the type of stimulation (figure 8). Applicant's limitations of intended use such as lead placement and suggesting a configuration to the user are given no patentable weight since the leads and communication devices are not specified as part of the recited invention. The suggesting can be merely what is stored in the device. The iteration may be stopped once an optimal configuration has been found including an iteration through all configurations (iteration limit). The selection prior to stimulation (claim 32) maybe based upon performance and the selection of the configurations is a "suggestion" to try the next configuration to the user. Applicant differs in reciting a hierarchy branch of electrode configurations to form a decision tree to determine the optimal settings. To have used such a well known method for selecting configurations in a known manner would have been obvious in view of Snell 5,716,382.

With respect to claims 30-31, 48-49, applicant differs in providing electrode nodes which could merely be yes/no decision blocks indicating iteration termination based upon the configuration efficiency. Such an inclusion would be an obvious operation for carrying out the Kroll et al method with to achieve the same desired result.

### ***Response to Arguments***

Applicant's arguments with respect to claims 19-54 have been considered but are moot in view of the new ground(s) of rejection.

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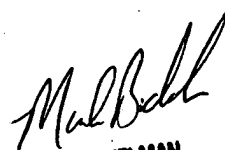
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mark W. Bockelman whose telephone number is (571) 272-4941. The examiner can normally be reached on Monday - Friday 8:00 - 4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carl Layno can be reached on (571) 272 -4949. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

MWB

January 22, 2008

  
MARK BOCKELMAN  
PRIMARY EXAMINER